Supreme Court, U. S.
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OCT 14 1980
MICHAEL RODAK, JR., CLERK

80-643

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

D. J. STRATOS and DELORES M. STRATOS,
of whom D. J. STRATOS is,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

This case was instituted by the Petitioner D. J. Stratos under the provisions of 26 USC 7426 entitled "Civil Actions by Persons Other than Taxpayers" seeking to enjoin a wrongful tax levy, seizure, and sale of real property in possession of the Petitioner. Although the Petitioner was in possession of the real property at the time of the levy, the Petitioner did not own the title to the real property. The District Court found that the Petitioner's possession of the real property was insufficient to give him standing to challenge the levy, and therefore dismissed the Amended Complaint for lack of subject matter jurisdiction. The Court of Appeals affirmed. The questions presented are:

1. Whether the possession by the Petitioner of the real property in question, together with the rights appurtenant to that possession, is sufficient to permit Petitioner his day in Court under 26 USC 7426 to challenge the wrongful tax levy, sale, and seizure of the real property in his possession.

2. Whether the statute 26 USC 7426 as interpeted and applied by the Courts below deprives the Petitioner of his Fourth and Fifth Amendment rights by unreasonably seizing and depriving Petitioner of his possession and property without due process of law and without just compensation.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

The Petitioner, D. J. Stratos, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on July 14, 1980.

OPINIONS BELOW

The Order of the District Court of South Carolina, Charleston Division, dated March 12, 1979, dismissing the Petitioner's Amended Complaint for lack of subject matter jurisdiction is found in the Appendix hereto.

The Order of Court of Appeals for the Fourth Circuit dated July 14, 1980, was decided per curiam affirming the District Court decision, and is also found in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

This case was instituted by the Petitioner D. J. Stratos under the provisions of 26 USC 7426 entitled "Civil Actions by Persons Other than Taxpayers" seeking to enjoin a wrongful tax levy, seizure, and sale of real property in possession of the Petitioner. Although the Petitioner was in possession of the real property at the time of the levy, the Petitioner did not own the title to the real property. The District Court found that the Petitioner's possession of the real property was insufficient to give him standing to challenge the levy, and therefore dismissed the Amended Complaint for lack of subject matter jurisdiction. The Court of Appeals affirmed. The questions presented are:

1. Whether the possession by the Petitioner of the real property in question, together with the rights appurtenant to that possession, is sufficient to permit Petitioner his day in Court under 26 USC 7426 to challenge the wrongful tax levy, sale, and seizure of the real property in his

possession.

2. Whether the statute 26 USC 7426 as interpeted and applied by the Courts below deprives the Petitioner of his Fourth and Fifth Amendment rights by unreasonably seizing and depriving Petitioner of his possession and property without due process of law and without just compensation.

STATUTES INVOLVED

The pertinent portions of the Fourth and Fifth Amendments to the United States Constitution, 26 USC 7426, 26 USC 6332, and Section 15-1-30 of the Code of Laws of South Carolina, 1976, are set forth in the Appendix hereto.

STATEMENT

The real property which is the subject of this action contains approximately 21.4 acres of highland and 2.3 acres of marshland and pond located on the North side of Bears Bluff Road along deep water known as Church Creek on Wadmalaw Island, Charleston County, South Carolina.

On January 2, 1973, Dr. Vince Mosely conveyed title to the real property to an individual going under the name of M. G. Miller. At the time of said conveyance, a purchase money mortgage was executed by the individual known as M. G. Miller to Dr. Vince Mosely. During the course of the ensuing year, M. G. Miller disappeared from the property and from the Charleston area. When the mortgage became due, Miller could not be found, and the mortgage was assigned by Mosely to Delores M. Stratos, the Petitioner's wife, for value. On January 25, 1974, the Petitioner, D. J. Stratos, took actual physical possession of the property, and commenced on a course of adverse possession, claiming the property as his own against all the world.

On June 13, 1975, a notice of federal tax lien was filed on the public records of Charleston

County in the amount of Forty-six thousand ninety-six and 11/100 ($46,096.11) Dollars against Donald E. Miles a/k/a Michael G. Miller a/k/a Robert G. Glore, Jr. a/k/a Robert G. Clore, Jr. The Petitioner Stratos after receiving notice of said federal tax lien contacted the United States for information concerning Donald E. Miles, the taxpayer, whom the government claims to be the true owner of the property in question. After obtaining information from the government concerning the identity of the taxpayer, Donald E. Miles, and after consulting with Dr. Mosely the seller and with John Whaley the real estate agent in the sale to M. G. Miller, the Petitioner Stratos determined that M. G. Miller who purchased the property and Donald E. Miles the taxpayer were not the same person.

Because he was in possession and claimed an interest in this property which did not appear to belong to the taxpayer Miles, the Petitioner Stratos commenced this action under 26 USC 7426 to enjoin the wrongful levy, seizure and sale. The parties stipulated that the government would not complete the sale of the property until after the District Court rendered a decision. After the District Court dismissed the case and failed to find standing for the Petitioner under 26 USC 7426, the government seized the property by padlocking one of the entrances thereto, and completed the sale for a bid of Thirty-three thousand one hundred and No/100 ($33,100.00) Dollars.

The Court of Appeals upheld the judgment of the District Court per curiam upon the opinion of the District Judge.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the erroneous interpretation of federal statute 26 USC 7426 works an egregious injustice upon the Petitioner D. J. Stratos. That is, the lower courts have allowed the government to levy against,

seize and sell at public auction the subject real property of which the Petitioner is in possession, and in which the delinquent taxpayer Miles owns no interest whatever, without permitting the Petitioner to have the benefit of a judicial inquiry as to whether the government's actions are wrongful. The decision below erroneously relies on the thesis that the Petitioner's possession of the real property and his adverse claim to ownership of the real property are not a sufficient interest in the property as required by 26 USC 7426 to permit the Petitioner to avail himself of the mechanism that the Congress has created for the purpose of checking the government's power to summarily levy against, seize, and sell property thought by the government to be subject to a lien for unpaid taxes. This erroneous thesis presents the first question as set forth above.

The second question presented to the Court in need of its review in this case is that if the statute 26 USC 7426 has been correctly interpreted by the courts below, then the statute violates the fundamental Fourth and Fifth Amendment rights of the Petitioner. If, indeed, the Petitioner does not have standing under 26 USC 7426 to challenge the government's levy upon, seizure, and sale of the subject real property, then the Petitioner has had his rights unreasonably seized by the government; he has been deprived of his property without due process of law, and has had his property taken for public use without just compensation.

The determination of whether an individual has an interest in property, or indeed of what constitutes "property", is governed by state law. Crow v. Wyoming Timber Products Co., 424 F2d 93, (C.A. 10, 1970); Wagner v. U. S., 573 F2d 447, (C.A.7, 1978); Magavern v. U. S., 415 F. Supp. 217 (N. Y. , 1976). The Petitioner Stratos has, in this case, property which is subject to constitutional protections. He has property by virtue of his possession of the premises and of the rights which South Carolina law bestows on him as a result of that possession. Under South Carolina

law, a possessory interest is protected in various circumstances by the awarding of damages in tort under common law or by statute for an infringement of the possessory interest. Bultman v. Atlantic Coast Line R. Co., 88 SE 279, (S.C., 1916); Elliot v. Wilson, 187 SE 825, (S.C., 1936); Johnson v. McIlwain, Rice 368, 375, (S.C., 1839); Beaufort Land & Investment Co. v. Lumber Co., 68 SE 637, (S.C., 19); S. C. Code, 1976, Section 58-17-3920. More importantly, under South Carolina law, the holder of a possessory interest in real estate is protected from being ousted from possession except by one with superior title. "One in possession of a tract of land has the right to retain the possession against all the world, except the true owner." Morton v. Tolbert, 98 SE 199, (S.C., 1919); Nicholson v. Villepegue, 74 SE 506, (S.C., 1912). This is in keeping with the majority rule on the subject, as Corpus Juris Secundum is cited for the proposition that by the "greater weight of authority", prior possession alone is sufficient to maintain ejectment against the defendant who has no better right or title, even though the possession has not yet ripened into title by adverse possession. CJS Ejectment, Section 18; Weaver v. Whilden, 11 SE 686, (S.C., 1890); Frederick v. Chapman, 142 SE 247, (S.C., 1928).

Aside from the property rights given to the Petitioner by state law based on his possession of the real property, he also has a property right in terms of his uninterrupted adverse possession and claim to adverse ownership of the premises. Under South Carolina law, adverse possession for less than the statutory period required to ripen into title is transferable between individuals by tacking. Tacking of lengths of adverse possession is permitted between living individuals under the state's twenty (20) year statute, and is permitted between ancestor and heir under the state's ten (10) year statute. Terwilliger v. Daniels, 72 SE 2d 167, (S.C., 1952); Terwilliger v. White, 72 SE

2d 169, (S.C., 1952). This is in direct contradiction to the case of Ellen v. Ellen, 16 SC 132, (1881), which is relied upon in the decision of the District Court.

According to South Carolina statutory definition, the term real property is "co-extensive with lands, tenements, and hereditaments." Code of Laws of South Carolina, 1976, Section 15-1-30. Hereditaments is a term "used as the widest expression for real property of all kinds, and is therefore employed in conveyances after the words 'lands' and 'tenements' to include everything of the nature of realty which they do not cover." Blacks Law Dictionary, 4th Edition. "The term [property] includes every right, title, estate, or interest, whether legal or equitable, perfect or imperfect, inchoate or complete, and rights which lie in contract, whether executory or executed." Bultman v. Atlantic Coast Line R. Co., Supra.

Clearly, then, the Petitioner has property rights in the real property in question. These property rights are damaged when the government levies upon, seizes, and sells the real property. The levy itself put the Petitioner to great expense and effort to ascertain whether the taxpayer Donald E. Miles was actually M. G. Miller who had purchased and then abandoned the property. The seizure was effected by padlocking an entry gate to the premises, forcing the Petitioner to find other means of access. The sale has caused the Petitioner to have to physically turn away trespassers and defend his possessory interest in litigation against purchasers from the government. Yet the courts below have refused the Petitioner standing to challenge the wrongful levy, and have refused to render a judgment as to the wrongful nature of the government's actions. A reading of the testimony will show however, that the levy, seizure, and sale were wrongful, in that Donald E. Miles was not the same person as M. G. Miller who purchased the property. Further evidence gathered since the trial date underscores the wrongful

nature of the government's actions, but Mr. Stratos is denied his day in court as to same because of the lower court's erroneous interpretation of the statute 26 USC 7426.

The language of the statute is clear. Under the headings "Civil Actions By Persons Other Than Taxpayers, Actions Permitted, Wrongful Levy," the statute provides:

> If a levy has been made...any person... who claims an interest in...such property and that such property was wrongfully levied upon may bring a civil action against the United States... (italics added). 26 USC 7426 (a)(1).

Obviously, the Petitioner not only claims an adverse ownership interest, but he has a possessory interest which he can protect in state courts and which he can transfer to others.

The legislative history supports granting the Petitioner standing, also:

> Your committee believes where the government levies on property which, in part at least, a third person considers to be his, he is entitled to have his case heard in court. 1966, US Congressional Code & Administrative News, 3750.

In Western Pennsylvania National Bank v. United States, 354 F. Supp. 373, (W.D., Pa., 1973), the court's analysis (p. 375) said that four components were necessary for 26 USC 7426 (a)(1) to apply: there must be "(1) a levy or (2) a sale and that a claim must be made by (3) one 'who claims an interest in or lien on such property' and (4) that such property was wrongfully levied upon." In United States v. Doyal, 462 F.2d 1357, (C.A. 5, 1972), the court only requires that the person seeking relief be one "who claims an interest in or lien upon or lien on the levied property." In Rosenblum v. United States, 549 F2d 1140 (C.A. 8, 1977), cert. denied, 434 US 818,

(1977), the court said that the purpose of statutes such as 26 USC 7426 was to give a judicial remedy to a person whose property was seized wrongfully to satisfy the tax liability of someone else. The "wrong" contemplated, according to the Rosenblum Court, is that wrong "suffered by the third person when his property is taken to satisfy the tax obligations of another."

The language of the statute and the foregoing cases describe the situation of the Petitioner with exactitute: Stratos claims an interest and has possessory rights to the property, but the government has levied, seized, and sold that property to satisfy the tax obligation of Donald E. Miles who has no interest at all in the premises. Unless the Supreme Court grants a writ of certiorari on the questions of the lower court's interpretation of the statute, the Petitioner will have suffered great damages to his rights at the hands of the government, and will be deprived of a hearing in regards to the government's actions.

On the other hand, if the court below was not erroneous in application and construction of the statute, then the question of constitutionality of the statute requires the attention of the Supreme Court as a statute which violates the Fourth and Fifth Amendment rights of the Petitioner. In the case of Alabama Exchange Bank v. United States, 373 F. Supp. 1221, (M.D. Ala., 1974), the court decided that holders of security interests were protected under the statute from having their security interests wrongfully levied upon; if they were not protected and permitted to argue their case under 26 USC 7426, then their Fifth Amendment rights would be violated by a taking without due process. Again in the Rosenblum v. U. S. case cited supra., the court reasoned that such summary collection procedures of the government as Internal Revenue Levy, Seizure, and Sales, were not violative of due process guarantees in the Fifth Amendment, so long as there was a post-collection judicial remedy. In the case at hand, the Petitioner Stratos was not only denied an in-

quiry into the wrongfulness of the levy by the trial court when he requested an injunction prior to the seizure and sale; but he has also been refused his day in court by the Court of Appeals after the seizure and sale took place. Denial of his rights to a hearing prior to the government's levy, seizure, and sale of the property which he possessed violates the Petitioner's Fifth Amendment right to due process. The fact that the proceeds of the government's sale of the property in which Stratos had rights which were damaged, went to fill the public coffers, constitutes a taking for the public use without just compensation in further violation of the Fifth Amendment.

The forceful seizure of the property by padlocking the entry gate fits the definition of State v. Morris, 133 SE2d 744, (S.C., 1963): "a seizure contemplates a forceful dispossession of the owner." The government likewise contemplated a forceful dispossession of the Petitioner when the entry gate was padlocked. In addition to having to find new access to his property, Stratos faces the penalties prescribed by 26 USC 6332 (c) for refusing to yield the property of which he rightfully remains in possession. The lower court's application of the statute 26 USC 7426 has violated the Petitioner's Fourth Amendment right to be secure from unreasonable seizures in that the government has seized his property and has never had to answer before a judicial officer to acquire so much as a warrant.

Because the statute should be construed in such a manner as to uphold its constitutionality, and because the Petitioner's constitutional rights have been trampled under the statute's application to his case thus far, the Petitioner prays that this Supreme Court grant the requested writ of certiorari. Because the Petitioner is in need of the Supreme Court's protection of his constitutional rights, the Petitioner urges that the Court's discretionary jurisdiction might be exercised in this case in a manner peculiarly appropriate to the ends of justice.

The Petitioner respectfully requests that this court review his need for a chance to be heard on the merits of this action.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

DAVID AND KRUGER

Walter J. Kruger III

Walter J. Kruger, III

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Civil Action No. 76-1890

D. J. STRATOS and DELORES M. STRATOS,	)	
Plaintiffs,	)	
-versus-	)	ORDER
UNITED STATES OF AMERICA,	)	
Defendant.	)	

Plaintiffs instituted this wrongful levy action seeking to enjoin the United States from selling a certain taxpayer's interest in a parcel of real property on which Plaintiff Delores Stratos holds a mortgage. Plaintiffs each claimed to have an interest in the subject real property sufficient to maintain this action under 26 U.S.C. Section 7426(a)(1) (1976). Delores Stratos claimed a lien on the subject real property by virtue of her mortgage, and D. J. Stratos claimed an interest by adverse possession. Plaintiffs further claimed that the levy was wrongful as to each of them under Section 7426(a)(1) because the taxpayer, Donald E. Miles, was not the owner of the real property in question. The court makes no decision as to the ownership of the real property in question, because Plaintiffs each lack the requisite interest in the subject real property to maintain this action.

This non-jury matter came before the court on January 23, 1979. Upon consideration of the evidence, the arguments, and the memoranda of counsel, the court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This is an action by Plaintiffs seeking to enjoin the sale pursuant to levy by the United States of America of a federal taxpayer's right, title, and interest in and to certain real property on which Plaintiff Delores Stratos has a mortgage.

2. The real property in question was conveyed by Dr. Vince Moseley to one M. G. Miller by deed dated January 2, 1973, recorded in the Office of the Register of Mesne Conveyance, Charleston County, South Carolina, in Book W100, at Page 213. A mortgage dated January 2, 1973, in the original amount of $23,600.00 was executed in the name of M. G. Miller to Vince Moseley, and was recorded in Book W100, at Page 185.

3. The mortgage described in Finding No. 4 was assigned by Vince Moseley to Plaintiff Delores Stratos on January 25, 1974, and the assignment was recorded December 3, 1975, in Book F108, at Page 259.

4. A Notice of Federal Tax Lien was filed in the RMC Office for Charleston County on June 13, 1975, in the amount of $46,096.11 against Donald E. Miles, a/k/a Michael G. Miller, a/k/a Robert G. Glore, Jr., a/k/a Robert G. Clore, Jr.

5. Plaintiff D. J. Stratos testified at trial that he claimed an interest in the subject real property by adverse possession. He testified that his attempt at adverse possession of the property commenced on January 25, 1974.

CONCLUSIONS OF LAW

1. In order to maintain an action under 26 U.S.C. Section 7426(a)(1)(1976), each of

the Plaintiffs must establish ownership of an interest in or lien upon the parcel of real property levied upon and seized by the United States of America; and that such property was wrongfully levied upon and seized by the United States.

2. Although the United States concedes that the mortgage of Plaintiff Delores Stratos is entitled to priority over the federal tax lien, the seizure by the United States of the taxpayer's interest in the real property did not affect the interest in the real property of Delores Stratos as a mortgagee. Therefore, as to her, the levy cannot be wrongful. See Western Pennsylvania National Bank v. United States, 354 F. Supp. 373 (W.D. Pa. 1973); American Oil Co. v. United States, 383 F. Supp. 1281 (N.D. Okl. 1974).

3. The real property is still subject to the mortgage and any sale of the taxpayer's interest in such real property would not affect the legal efficacy of the mortgage. Accordingly, under 26 U.S.C. Section 7426(1976), the court lacks jurisdiction as to the claim of Plaintiff Delores Stratos.

4. Plaintiff D. J. Stratos claims an interest in the subject real property by adverse possession. However, under South Carolina law, the first time that one can claim an interest in real property by adverse possession is after such possession has continued for a period of ten years. "Adverse possession gives no right until the expiration of ten years." Ellen v. Ellen, 16 S.C. 132 (1881). Plaintiff D. J. Stratos admitted at trial that he has not been in possession of the property for ten years, and therefore, he has no interest in the real property. Accordingly, the court lacks jurisdiction of the claim of D. J. Stratos under 26 U.S.C. Section 7426(1976).

Plaintiff D. J. Stratos is an attorney. He represented an individual using the name Michael G. Miller in Miller's acquisition of the subject real property. In this action, D. J. Stratos has sought to adversely possess that same property

against the client he represented in its acquisition. However, because Plaintiff D. J. Stratos has not satisfied the threshold duration requirement for adverse possession, this court does not reach the serious question of whether, even if the durational requirement were satisfied, professional ethics and South Carolina law would allow an attorney under these circumstances to establish title by adverse possession.

5. One in possession of real property can maintain or defend an action for ejectment against all but the true owner. Morton v. Tolbert, 111 S.C. 442, 98 S.E. 199 (1919). However, the right to maintain or defend such an action does not confer on such person an interest in the real property. The law favors peaceful resolution of disputes over the right to possession of property and, therefore, allows one in possession to maintain or defend such an action. Consequently, possession alone does not give one title to real property or an interest in property under South Carolina law. Therefore, mere possession of real property is not an interest in property sufficient to maintain an action against the United States under 26 U.S.C. Section 7426(1976).

Based upon the Findings of Fact and Conclusions of Law set out above, this court concludes that it lacks subject matter jurisdiction over this action. Accordingly, Plaintiffs' Complaint is dismissed.

AND IT IS SO ORDERED.

Charles E. Simons, Jr.
United States District Judge

Aiken, South Carolina

March 12, 1979.

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 79-1280

D. J. Stratos and Delores M. Stratos,

Appellants,

v.

United States of America,

Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Charles E. Simons, Jr., District Judge.

Argued: June 2, 1980 Decided: July 14, 1980

Before BRYAN, Senior Circuit Judge, RUSSELL and HALL, Circuit Judges.

Walter J. Kruger, III (David and Kruger on brief) and Stan Jaskiewicz, Jr. for Appellants; Richard W. Perkins, Tax Division, Dept. of Justice (M. Carr Ferguson, Assistant Attorney General; Thomas E. Lydon, Jr., United States Attorney; Gilbert E. Andrews and Kristina E. Harrigan, Tax Division, Dept. of Justice on brief) for Appellee.

PER CURIAM:

Plaintiffs, D. J. Stratos and his wife, Delores, sued to enjoin the United States from selling, under its levy for taxes, certain real property located in Charleston County, South Carolina, upon which Delores Stratos holds a mortgage and to which D. J. Stratos claims a possessory interest that has not yet ripened into adverse possession. Each asserted that the levy for back taxes was wrongful as to them because the taxpayer Donald Miles, was not the true owner. I.R.C. Section 7426(a)(1)(1976). Refraining from adjudicating the ownership issue, the District Court dismissed the suit for lack of subject matter jurisdiction. It reasoned that the seizure and sale did not adversely affect the interest of the mortgagee in the property and mere possession did not confer a sufficient interest in D. J. Stratos to enable him to bring a wrongful levy action. Stratos v. United States, No. 76-1890 (D.S.C. Mar. 12, 1979).

The judgment now on appeal will be upheld upon the opinion of the District Judge.

Affirmed.

ARTICLE IV

SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

ARTICLE V

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS; DUE PROCESS: EMINENT DOMAIN

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

South Carolina Code of Laws, 1976, as amended

Section 15-1-30 CIVIL REMEDIES AND PROCEDURES

Section 15-1-30 "Real property" and "real estate" defined.

The words "real property" and "real estate" as used in this Title are coextensive with lands, tenements and hereditaments.

HISTORY: 1962 Code Section 10-3; 1952 Code Section 10-3; 1942 Code Section 897; 1932 Code Section 897; Civ. P. '22 Section 845; Civ. P. '12 Section 482; Civ. P. '02 Section 444; 1870 (14) Section 466.

CASE NOTES

Cited in McDonald v. Welborn, 220 SC 10, 66 SE2d 327 (1951).

United States Code

26 USC 7426 Civil actions by persons other than taxpayers

(a) Actions permitted. —

(1) Wrongful levy. - If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such

property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

* * *

(b) Adjudication. - The district shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction. - If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) Recovery of property. - If the court determines that such property has been wrongfully levied upon, the court may—

(A) order the return of specific property if the United States in in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property.

26 USC 6332 Surrender of property subject to levy

(c) Enforcement of levy. —

(1) Extent of personal liability. Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person

and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at an annual rate established under section 6621 from the date of such levy (or, in the case of a levy described in section 6331(d)(3), from the date such person could otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax, liability for the collection of which such levy was made.

Supreme Court, U. S.
FILED
DEC 4 1980
MICHAEL RODAK, JR., CLERK

No. 80-643

In the Supreme Court of the United States

OCTOBER TERM, 1980

D.J. STRATOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-643

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision below dismissing his wrongful levy action under 26 U.S.C. 7426, on the ground that he did not have a sufficient interest in certain property seized and sold by the Internal Revenue Service to satisfy the tax liability of a third party.

The pertinent facts may be summarized as follows: In January 1973, a person calling himself M.G. Miller purchased real property in South Carolina in a transaction in which petitioner represented him. One year later, after Miller failed to make the payments due under a purchase money mortgage, the mortgagee assigned the mortgage to petitioner's wife, Delores M. Stratos. At the same time, petitioner began to occupy the property in an attempt to begin the term of possession necessary to acquire title by adverse possession, as provided by South Carolina law. On June 13, 1975, a notice of federal tax lien was filed in the proper

county office in the amount of $46,096.11 against Donald E. Miles, a/k/a Michael G. Miller, a/k/a Robert G. Glore, Jr., a/k/a Robert G. Clore, Jr. Pursuant to this lien, the United States levied upon the interest of Donald E. Miles in the real property (Pet. App. 14-15).

Petitioner and his wife then brought this wrongful levy action in the United States District Court for the District of South Carolina under 26 U.S.C. 7426, seeking to enjoin the sale of the property, on the ground that Donald E. Miles was not the same person as the M.G. Miller who bought the property, and thus had no interest in it. After a trial on the merits, the district court dismissed the suit for lack of jurisdiction. It found that petitioner lacked the requisite interest in the property because his attempted adverse possession had not yet ripened into any substantive ownership interest under South Carolina law (Pet. App. 14-16). The court of appeals affirmed per curiam (Pet. App. 17-18).

1. The decision below correctly upheld the dismissal of petitioner's wrongful levy suit for lack of jurisdiction. Section 7426 of the Internal Revenue Code of 1954 permits suits by persons other than the taxpayer to enjoin a wrongful levy or sale of property for the taxpayer's tax liabilities, but restricts standing to sue to persons who claim an interest in or lien on the seized property. Neither the Code nor the Regulations defines the requisite interest to bring such an action. However, the legislative history of the provision suggests it was intended as a procedural measure to implement the substantive provisions of the Federal Tax Lien Act of 1966, and not as a grant of additional substantive rights. H.R. Rep. No. 1884, 89th Cong., 2d Sess. 3 (1966). Thus, the phrase "interest in * * * property" should be defined in the context of the substantive interests protected by the Act. Those interests, appearing in Section 6323(h) of the Code, are those of owners, secured creditors, mechanic's lienors, certain purchasers, lessees, optionees and buyers under

executory contracts of sale. Accordingly, Section 7426 confers standing on parties other than the taxpayer who claim ownership or an interest of the kind protected by the Federal Tax Lien Act in the property levied on or seized. Indeed, all of the cases applying Section 7426 have concerned third parties alleging one of these interests. *E.g.*, *Rosenblum* v. *United States*, 549 F. 2d 1140 (8th Cir.), cert. denied, 434 U.S. 818 (1977) (ownership alleged); *Alabama Exchange Bank* v. *United States*, 373 F. Supp. 1221 (M.D. Ala. 1974) (security interest alleged).

Whether petitioner's naked possession of the property gives rise to a substantive property interest is a question of South Carolina law that does not warrant review by this Court. Cf. *World Marketing, Ltd.* v. *Hallam*, 608 F. 2d 392, 395 (9th Cir. 1979); *Dugan* v. *Missouri Neon & Plastic Advertising Co.*, 472 F. 2d 944, 949 (8th Cir. 1973); *Crow* v. *Wyoming Timber Products Co.*, 424 F. 2d 93 (10th Cir. 1970). South Carolina law deems a possessor with no claim of right or title to be a trespasser and his possession continues in trespass unless and until it ripens after a period of ten years into a property right recognized by statute. *Adams* v. *Adams*, 200 S.C. 131, 138, 66 S.E.2d 809, 812 (1951). See also *Ellen* v. *Ellen*, 16 S.C. 132, 141 (1881). His right to eject all later trespassers (*Morton* v. *Tolbert*, 111 S.C. 442, 98 S.E. 199 (1919)) thus cannot be equated with a grant of substantive rights to the land. Only under certain circumstances, and after ten continuous years of adverse possession, may an adverse possessor acquire any ownership interest in the land. S.C. Code § 15-67-210 (1976).

Petitioner's possession, beginning no earlier than January 25, 1974, was not for ten continuous years as of the date of the levy. Thus, under South Carolina law, petitioner had

no protected interest in the property that would give him standing to seek to enjoin a levy under Section 7426 of the Code.[1]

2. Contrary to petitioner's further assertion (Pet. 5), the interpretation of federal and South Carolina law by the decision below did not deprive him of his property without due process of law. Petitioner's argument ignores the fact that he has the opportunity to litigate his right to continue in possession of the property in the South Carolina courts in opposition to the person who purchased the property at the tax sale.[2] In any such subsequent litigation between petitioner and the purchaser at the tax sale, the purchaser can assert only whatever title was held by the delinquent taxpayer. See Section 6339(b)(2) of the Code. A state court is better suited to examine and adjudicate the parties' relative claims to the property than is a federal court exercising jurisdiction under the wrongful levy statute. Accordingly, there is no deprivation of any of petitioner's constitutional rights.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER, 1980

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[1]The district court recognized that the mortgage of Delores Stratos was prior to the tax lien, but correctly held that the levy could not be wrongful as to her, because the levy did not affect her interest (Pet. App. 15). Delores Stratos has not joined in the petition here.

[2]Contrary to petitioner's assertions (Pet. 4, 7, 10), there is no evidence that he was ever dispossessed from the property. Indeed, petitioner states (Pet. 7) that he currently is defending his claim of a right to continued possession in litigation with the purchaser at the tax sale.